RE GOH WAI KAH; EX P TAN LAY LEE

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[BANKRUPTCY NO: D-29-2525-2009]
25 NOVEMBER 2014

BANKRUPTCY: *Discharge – Order for discharge – Findings of director general of insolvency ('DGI') – DGI's report – Application by creditors to set aside report – Whether report unreliable – Hearing of bankrupt's application for order of discharge – Whether court had power to reject DGI's report – Whether premature to decide creditor's application – Whether creditors should have objected during hearing of order for discharge – Bankruptcy Act 1967, s. 33*

On 24 June 2003, the judgment debtor was adjudged a bankrupt. *Vide* encl. 105, the bankrupt applied to discharge himself from bankruptcy under s. 33 of the Bankruptcy Act 1967 ('the Act'). For purposes of encl. 105, the Director General of Insolvency ('DGI') submitted a report as required under s. 33(3) of the Act. However, *vide* encls. 119, 120, 121, 122 and 123, the judgment creditor ('JC') and other creditors respectively applied to set aside and/or expunge the DGI's report from the records of the court. It was argued, *inter alia*, that (i) the DGI's findings were perverse, flawed, incomplete, inaccurate and unreliable; (ii) the court had jurisdiction to adjudicate encls. 119 to 123 pursuant to ss. 86, 87(1) and 91(1) of the Act; (iii) the DGI's report was unreliable since the bankrupt submitted untruthful declarations to the DGI ; (iv) the bankrupt had committed various offences under the Act and the Penal Code; (v) the DGI's report failed to address the bankrupt's dissipation of his assets in the midst of the bankruptcy proceedings; and (vi) the DGI's report was incomplete since no reference was made to the bankrupt's *prima facie* offences/breaches of the Act. However, the bankrupt submitted that the provisions under the Act and the Rules made thereunder allowed the bankrupt but not the creditor to dispute the statements in the DGI's report.

Held (dismissing encls. 119, 120, 121, 122 and 123 with costs):

(1) Enclosures 119 to 123 were misleading and without basis. In deciding whether to grant or refuse an order of discharge, the court shall take into consideration a report of the DGI. However, the mandatory requirement that the DGI's report is the *prima facie* evidence of the conduct of a bankrupt is not without exception. If the DGI's report was incomplete and unreliable, the court can reject the usage of the said report in granting or refusing the order for discharge. It was still up to the court whether to accept the statement contained therein or to order for further investigation. On the facts, the hearing of the order for discharge was still pending the disposal of encls. 119 to 123. Hence, there was no basis for these applications to be filed and heard now. (paras 18, 20, 21 & 29)

(2) The court was empowered to direct further investigation to be conducted by the DGI at the hearing of the order for discharge should the report provided was incomplete and devoid of pertinent information. If the JC and the other creditors had abundance of strong reasons as to why the DGI's report should be rejected, they may object the said report at the hearing of the order of discharge before the registrar. Further, the applicants failed to show under which provision of the law those applications were made. It was premature for them to challenge the DGI's report now as the proper platform to challenge or dismiss the said report was at the hearing of the order for discharge pursuant to s. 33 of the Act. (paras 23, 26 & 28)

Case(s) referred to:

Development & Commercial Bank Bhd & Ors v. Loke Theen Fatt [2010] 5 CLJ 583 HC ***(refd)***

Lim Hun Swee v. Malaysia British Assurance Bhd & Ors and Other Appeals [2010] 8 CLJ 680 CA ***(refd)***

Public Bank Bhd v. Choong Yew Wah [2014] 5 CLJ 695 CA ***(refd)***

Re Goh Wai Kah, Ex p Tan Lay Lee [2006] 6 CLJ 308 HC ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew; Ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 24(4), 33(1), (3), 38(1)(b), (ba), (bb), (c), (d), (e), 52, 58, 72, 86, 87(1), 91(1), 109(1)(a), (b), (d), (e), (f), (m)(i), (p), 114(1)(c)

Bankruptcy Rules 1969, r. 196

National Land Code, s. 349(1)

Penal Code, s. 421

For the plaintiff - Bong Lep Siong; M/s Cheah Teh & Su

For the defendant - Tejindarpal Kaur; M/s Tejindarpal & Co

For the intervener - Faezahnoor Hassan (Nurulazeanie Jamian with her); Insolvency Department, Malaysia

Reported by Kumitha Abd Majid

JUDGMENT

Zaleha Yusof J:

[1] Enclosures 119, 120, 121, 122 and 123 are applications filed by the judgment creditor (JC) and other creditors to set aside and/or expunge the Director General of Insolvency's (DGI) report from the records of the court.

(a) enclosure 123 - the JC's application to set aside the DGI's report *vide* summons in chambers dated 17 March 2014;

(b) enclosure 119 - creditor, Tan Aik Teck's application to set aside the DGI's report *vide* summons in chambers dated 17 March 2014;

(c) enclosure 120 - creditor, Ridgemonde Chemicals and Resins Sdn Bhd's application to set aside the DGI's report *vide* summons in chambers dated 17 March 2014;

(d) enclosure 121 - creditor, Stadco Sdn Bhd's application to set aside the DGI's report *vide* summons in chambers dated 17 March 2014; and

(e) enclosure 122 - the creditor, Westech Sdn Bhd's application to set aside the DGI's report *vide* summons in chambers dated 17 March 2014.

The bankrupt and the DGI are opposing these applications.

[2] For the purpose of hearing of encl. 123, the JC, the bankrupt and the DGI have filed the following affidavits:

(a) enclosure 118, JC's affidavit in support affirmed by the JC herself on 17 March 2014;

(b) enclosure 125, bankrupt's affidavit in reply (1) affirmed by the bankrupt himself on 6 May 2014;

(c) enclosure 126, JC's affidavit in reply affirmed by the JC herself on 19 May 2014;

(d) enclosure 130, bankrupt's affidavit in reply (2) affirmed by the bankrupt himself on 2 June 2014;

(e) enclosure 131, JC's affidavit in reply (2) affirmed by the JC herself on 17 June 2014;

(f) enclosure 138, DGI's affidavit in reply affirmed by Ezwan bin Abdul Majid on 1 October 2014; and

(g) enclosure 139, JC's affidavit in reply to DGI's affidavit affirmed by the JC herself on 16 October 2014.

[3] As the grounds to set aside the DGI's report in respect of the other creditors' applications in encls. 119, 120, 121 and 122 are similar to those of the JC's, the other creditors are relying on the JC's affidavits set out above by way of the other creditors' respective notices and intention to refer and use affidavit. Notices of intention can be found in Annexure A of the JC's written submission.

Introduction

[4] On 24 June 2003, the JD was adjudged bankrupt. The JD then proceeded to file an application dated 12 July 2013 *vide* encl. 105 to discharge himself from bankruptcy under s. 33 of the Bankruptcy Act (BA) 1967 (Act 360). As required by s. 33(3) of the Act 360, the DGI submitted a report dated 20 January 2014, for purposes of encl. 105.

[5] Chronology of events:

(i) on 12 July 2001, the JC's solicitors sent a letter of demand to the bankrupt demanding for repayment of RM520,000 which had been advanced by the JC to the bankrupt;

(ii) on 13 August 2001, upon failure of the bankrupt to adhere to the letter of demand, JC filed a claim against the bankrupt in KLHC Suit No. 22-1445-2001;

(iii) on 19 July 2002, the SAR allowed the JC's summary judgment application against the bankrupt. The bankrupt then appealed against the summary judgment;

(iv) on 17 February 2002, the High Court Judge dismissed the appeal;

(v) on 16 August 2002, a bankruptcy notice (BN) was issued and on 22 January 2003 the bankrupt committed an act of bankruptcy;

(vi) on 24 January 2003, a creditor's petition (CP) was presented to the bankrupt;

(vii) on 25 March 2003, more than two months after the bankrupt committed the act of bankruptcy and after the presentation of the CP, the bankrupt purportedly sold his 50% shares in the property known as No. 19 Jalan Kesuma 6, Taman Kesuma 68000 Ampang held under HS(D) 10569, PT 13002, Mukim Ampang, Ulu Langat District, Selangor (Kesuma property) to his brother, Goh Wai Keong for a consideration of RM190,000 *vide* a sale and purchase agreement dated 25 March 2003;

(viii) on 28 March 2003, CP was served on the bankrupt;

(ix) on 24 June 2003, the JD was adjudged bankrupt; and

(x) in August 2003, the said sale of Kesuma property was concluded and the bankrupt's 50% share in the Kesuma property was transferred to his brother.

Submissions By The JC

[6] The JC and other creditors' applications are based primarily on the DGI's findings which they alleged to be perverse, flawed, incomplete and/or inaccurate and utterly unreliable. The JC and the other creditors submitted that this court has the jurisdiction to adjudicate on encls. 119 to 123 pursuant to the following statutory provisions:

Section 86 of the Act 360 which provides as follows:

> If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Director General of Insolvency, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

Section 87(1) of the Act 360 which provides as follows:

> (1) The court shall take cognisance of the conduct of the Director General of Insolvency, and in the event of the Director General of Insolvency not faithfully performing his duties and duly observing all the requirements imposed on him by any statute, rules or otherwise with respect to the performance of his duties, or in the event of any complaint being made to the court by any creditor in regard thereto, the court shall inquire into the matter and take such action thereon as is deemed expedient.

Section 91(1) of the Act 360

> (1) Subject to this Act the court, under its jurisdiction in bankruptcy shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

[7] The bankrupt made various declarations to the DGI through the Soalan Awal dated 4 July 2003 (Soalan Awal), statement of affairs dated 4 July 2003 (SOA) and amended statement of affairs dated 5 January 2004 (amended SOA) which the JC and the other creditors cite as untruthful. The DGI however took no action and those alleged lies were not included in the DGI's report.

[8] The JC and other creditors submit that the DGI's report is utterly unreliable due to:

(i) Alleged untruthful declaration:

(a) Excerpt from bankrupt's untruthful declaration to the DGI following the Soalan Awal (exh. "TLL-2" of encl. 118):

- Bankrupt only had one joint account No. 0140-1125-1615 at Maybank KL Main Branch with his wife;
- He has not sold, charged, pledged or transferred any property whatsoever in the last five years prior 4 July 2003; and
- He and/or his wife have not sold any asset in the last two years;

(b) The bankrupt had declared his answers in Soalan Awal are true;

(c) Caution under ss. 38(1)(b), 38(1)(ba), 38(1)(bb), 38(1)(c) 38(1)(d), 38(1)(e) and 109(1)(m) was administered to the bankrupt;

(d) On 4 July 2003, the bankrupt affirmed before the Commissioner for Oath of the truthfulness of the SOA (exh. TLL-4 of encl. 118] and in it declared that he has only two unsecured creditors and three secured creditors;

(e) The first creditor's meeting was then conducted on 9 December 2003 and as the bankrupt was uncooperative during the first creditor's meeting and the SOA was incomplete, the DGI directed the bankrupt to file a further statement of affairs;

(f) The officer of DGI warned the bankrupt to be truthful during the first creditor's meeting and subsequently the bankrupt filed an amended SOA dated 5 January 2004 (exh. TLL-5 of encl. 118];

(g) In the amended SOA the bankrupt revealed that he had not just two unsecured creditors but instead had ten unsecured creditors with debts amounting to RM3,296,000 instead of RM645,000 as declared in the SOA;

(h) The JC and the other creditors allege that the evidence gathered from the public examination (PE) shows that the bankrupt had deliberately taken steps to hide his assets and transferred them to his brother in the midst of bankruptcy proceedings;

(i) The bankrupt had declared in the Soalan Awal that he had not transferred any property in the last five years but the truth is, on 25 March 2003, more than two months after the bankrupt committed the act of bankruptcy and after the presentation of the CP, the bankrupt purportedly sold his 50% shares in the property known as No. 19 Jalan Kesuma 6, Taman Kesuma 68000 Ampang held under HS(D) 10569, PT 13002, Mukim Ampang, Ulu Langat District, Selangor (Kesuma property) to his brother, Goh Wai Keong for a consideration of RM190,000 *vide* a sale and purchase agreement dated 25 March 2003;

(j) Completion of the sale was in August 2003 (Citibank's letter dated 5 August 2003 forwarding the title. See exh. TLL-8 of encl. 118);

(k) As to the false declarations, the JC and the other creditors submit that the bankrupt has committed various offences under Act 360 and the Penal Code ie;

(l) Section 109(1)(a), (b), (d), (e) and (f) of the Act 360:

> 1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
>
> (a) if he does not to the best of his knowledge and belief fully and truly discover to the Director General of Insolvency all his property, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade, if any, or laid out in the ordinary expenses of his family, unless he proves that he had no intent to defraud;

(b) if he does not deliver up to the Director General of Insolvency or as he directs all such part of his property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;

(d) if after the presentation of a bankruptcy petition by or against him or within twelve months next before such presentation he conceals any part of his property to the value of one hundred ringgit or upwards or conceals any debt due to or from him, unless he satisfies the court that he had no intent to defraud;

(e) if after the presentation of a bankruptcy petition by or against him or within twelve months next before such presentation he fraudulently removes any part of his property of the value of one hundred ringgit or upwards;

(f) if he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(m) Section 114(1)(c) of the Act 360

(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made shall in each of the cases following be punished with imprisonment, which may extend to one year, or with fine or with both:

(c) if he has, with intent to defraud his creditors or any of them, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

(n) Section 421 of the Penal Code

421. Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors

Whoever dishonestly or fraudulently removes, conceals, or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property, according to law, among his creditors or the creditors of any other person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

(o) The DGI's report fails to address and/or take into consideration with the alleged lies and the bankrupt's dissipation of this 50% shares in the midst of the bankruptcy proceedings. The above mentioned breaches and offences were also not mentioned in the report;

(p) The JC and the other creditors refer to the case of *Public Bank Bhd v. Choong Yew Wah* [2014] 5 CLJ 695 in which the Court of Appeal held as such:

> In the two reports made by the DGI dated 18 June 2012 and 21 June 2012, there was no reference to the respondent's failure to comply with s. 16(2)(b) of the Act, hence there was no explanation as to why such non-compliance was ignored by the DGI. In view of this omission, the respondent in fact relied on it to submit that there had not been any breach of s. 16(2)(b) as the DGI had failed to mention such offence. By this omission, the DGI's report was incomplete. The court under s. 33(4) of the Act is required by law to suspend any discharge. On this ground alone, the appeal ought to be allowed. (para 15)

(q) The JC and the other creditors submit that the DGI's report filed pursuant to s. 33(3) is similarly incomplete as no reference was made to the bankrupt's *prima facie* offences/breaches of the Act 360;

(r) The JC and the other creditors further submit that based on the decision of the Court of Appeal in *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors and Other Appeals* [2010] 8 CLJ 680, the DGI is duty bound to carry out a thorough investigation of the bankrupt's conduct under s. 72 of the Act 360. As per Ramly Ali JCA (as he then was):

> [13] In law, the DGI is duty bound to carry out a complete and efficient investigation. The report produced must be fair and not bias for or against the bankrupt or the creditors. This is in line with his duties entrusted upon him under s. 72 of the Act, which provides:
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> (72). As regards the debtor, the Director General of Insolvency shall:
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> (a) investigate the conduct of the debtor, and report to the court stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act or under sections 421, 422, 423 or 424 of the Penal Code or which would justify the court in refusing, suspending or qualifying an order for his discharge;
>
> (b) make such other reports concerning the conduct of the debtor as the court directs or as may be prescribed;
>
> (c) take such part as may be directed by the court or prescribed in the public examination of the debtor;
>
> (d) take such part and give such assistance in relation to the prosecution of any fraudulent debtor or any other person charged with an offence under this Act, as the Public Prosecutor may direct.

(s) Meanwhile, the case of *Re Goh Wai Kah, Ex p Tan Lay Lee* [2006] 6 CLJ 308 (a decision involving the bankrupt and the JC when the court allowed the JC's appeal against the decision of the Deputy Registrar on 23 December 2005 in allowing the DGI's application to withdraw the ongoing PE which yet to be completed. Ramly Ali J (as he then was) referred to s. 72 of the Act 360:

> The true construction of section 17(1) of the Bankruptcy Act 1967 is that the DGI in exercising his powers and duties under the Act may make an application to hold a public examination for the purpose of examining the debtor as to his conduct, dealing and property. In fact, it is more appropriate to say that the DGI is duty bound to make such an application for the public examination of the debtor under section 17 in order to facilitate the exercise of his duties trusted upon him under section 72 of the same act …

(t) JC and the other creditors also refer to the case of *Re Lau Kah Lay & Tang Kuong Tiew; Ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960, wherein the court held as such:

> The primary duty to investigate the wives of the bankrupts lies upon the OA and the law in this regard is s. 31 of the Act. The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt.
>
> At the very least the OA should have followed the trails of the involvement of the wives of the bankrupts in the supermarket business where their bankrupt husbands were without question the directing mind and body. The wives should be questioned as to where they got the money to involve in that business and to show proof of it; and the accounts of those companies that they were involved in should be examined by an expert to unearth the trails of the money. Also, the office of the OA must not simply accept statements from the wives that they received the money from their relatives without going further and establishing that the money did come from their relatives.

(u) As such, it is only logical that the DGI conduct a full investigation as against the bankrupt so as to protect the interest of the creditors.

(ii) The bankrupt sold his cars and three club memberships in January 2001 and 2002 which took place less than five years before ROAO.

(a) Contrary to the bankrupt's declaration in the Soalan Awal that he had not sold, charged, pledged or transferred any property whatsoever in the last five years prior 4 July 2003, it was discovered

A during the PE that the bankrupt had sold his three cars and his club memberships to ESGI Sdn Bhd, a company with paid up capital of RM2 which is owned by the bankrupt (one share which was transferred to his sister in law on 4 February 2002 and the bankrupt's wife (one share) for a total sum of RM466,000;

B (b) The JC submits that there is no credible and sensible reason why a company with paid up capital of only RM2 had the need to purchase three cars and three club memberships;

(c) It is clear that the bankrupt has lied in the Soalan Awal, and in amended SOA that he does not have any asset; and

C (d) The DGI's report once again, did not address this issue.

(iii) Charging of Subang property which the DGI did not address in the DGI's report.

D (a) Contrary to the bankrupt's declaration in the Soalan Awal that he has not sold, charged, pledged or transferred any property whatsoever in the last five years prior 4 July 2003, it was discovered during the PE that bankrupt had executed a charge on his USJ house at No. 18, Jalan USJ 9/3B, UEP Subang 47620 Petaling Jaya (Subang property) *vide* a charge documents dated 23 May 2002 and drewdown a total sum of RM357,072 between April and May 2002 from RHB Bank. (exh. TLL-9 of encl. 118);

E (b) This was done four months before the BN was served, three months before judgment was entered, and about eight months after the JC filed a suit against the bankrupt on 13 August 2001;

F (c) As such, the bankrupt has committed an offence under s. 109(1)(p) of the Act 360 by charging the USJ property within 12 months before the presentation of the CP. Section 109(1)(p) of the Act 360 provides:

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> (p) if within twelve months next before the presentation of a bankruptcy petition by or against him or after the presentation of a bankruptcy petition and before the making of a receiving order he pawns, pledges or disposes of or sends out of Malaysia any property which he has obtained on credit and not paid for unless in the case of a trader he proves that such pawning, pledging, disposal of or sending out of Malaysia is in the ordinary way of his trade and that in any case he had no intent to defraud;

H (d) Yet again, the DGI's report did not address this issue.

I (iv) The existence of his other bank accounts.

(a) The only account that the bankrupt declared he owned in the Soalan Awal is the joint account with his wife, Tan Mee Cheng bearing Account No. 0140-1125-1615 at Maybank KL Main Branch (exh. TLL-2 of encl. 118);

(b) However, it was discovered during the PE that the bankrupt has other undisclosed accounts ie:

(i) An account with RHB Bank in which the bankrupt drew down a total sum of RM357,072 between April and May 2002. This is an offence under s. 109(1)(f) of the Act 360 which provides that:

> (1) any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
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> (f) if he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(ii) a joint account with his brother, Goh Wai Kok at Citibank in which massive sums were deposited into this joint account between January 2000 to September 2002 totalling RM1,618.391 (exh. TLL-10 of encl. 118). This is an offence under s. 109(1)(f) of the Act 360 which provides that:

> (1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
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> (f) if he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(iii) a financing account with EON finance in which the bankrupt drew down a total sum of RM1,300,000 which was discovered during the PE. This is an offence under s. 109(1)(a) and (f) of the Act 360 which stated as such:

> (1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
>
> (a) if he does not to the best of his knowledge and belief fully and truly discover to the Director General of Insolvency all his property, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade, if any, or laid out in the ordinary expenses of his family, unless he proves that he had no intent to defraud;

A

(f) if he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

(iv) a HSBC credit card account in which the bankrupt hold onto even after his bankruptcy but failed to inform HSBC and the
B bankrupt had repeatedly obtained credit in excess of RM1,000 from May 2004 to March 2005 which was after ROAO was recorded. Incurring credit in excess of RM1,000 after he was adjudicated a bankrupt without informing HSBC that he was an undischarged bankrupt, the bankrupt committed another offence
C under s. 109(1)(m)(i) of the Act 360.

(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
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(m) if being an undischarged bankrupt -

(i) either alone or jointly with any other person he obtains credit to the extent of one thousand ringgit or upwards, unless he proves that before obtaining the credit he informed the person
E giving the credit that he was an undischarged bankrupt;

(v) all these offences were never addressed or mentioned by the DGI in the DGI's report.

(v) The bankrupt's 50% shares in the Subang property and Kayangan Heights properties.
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(a) The finding of the DGI that the bankrupt does not have other assets that could be realised is perverse as the report fails to take into account the value of the bankrupt's interest/share in the following properties:

G (i) 50% share of the Subang property

(ii) 50 % share in bungalow lot in Kayangan Heights (Kayangan Heights property)

(b) In respect of the Subang property, the DGI as far back as
H 24 September 2003 applied pursuant to s. 349(1) of the National Land Code for the bankrupt's share of 50% be transferred to the DGI;

(c) The JC and the other creditors had on 17 occasions tried to follow up on the DGI's application since 14 December 2011. However, it
I was only through the DGI's affidavit affirmed on 1 October 2014 that the DGI made the shocking revelation for the first time that DGI believes there is a new instruction revoking the DGI's said application which resulting in the DGI not proceeding with the said application;

(d) This decision not to realise the bankrupt's Subang property was not disclosed in the DGI's report; and

(e) In view of the ROAO granted against the bankrupt on 24 June 2003, the bankrupt 50% shares in the Subang property and the Kayangan Height property ought to vest upon the DGI pursuant to ss. 24(4) and 58 of the Act 360 read with s. 349(1) of the National Land Code:

> S. 24(4)
>
> When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Director General of Insolvency.
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> S. 58(1):
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> The property of the bankrupt shall pass from Director General of Insolvency to Director General of Insolvency, and shall vest in the Director General of Insolvency for the time being during his continuance in office, without any conveyance, assignment or transfer whatever.
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> S. 349(1) of NLC 1965
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> Where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the Registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

(vi) Other grounds which render the DGI's report inaccurate.

(a) The cause of bankruptcy as stated in the DGI's report was that the petitioner demanded repayment of gratuity from the bankrupt as the bankrupt had co-operated with other company; and

(b) However, it was a fact that summary judgment was entered due to the bankrupt's failure to pay the judgment debt owing to the JC.

Submissions By The DGI

[9] In response to the JC's affidavit in support in encl. 118, the DGI through its affidavit in reply affirmed by Ezwan bin Abdul Majid on 1 October 2014 asserted that:

(a) DGI has no knowledge of the dissipation of 50% ownership of the bankrupt in the Kesuma property as it took place before the ROAO;

(b) There is no order made against the bankrupt by the court and/or any order for further examination of the affairs of the bankrupt at the conclusion of the PE despite the discovery of the bankrupt's 50% ownership in the Kesuma property;

(c) The DGI challenged the JC to strict proof and produce any court order showing that the bankrupt has committed various offences;

(d) It is clear that the DGI considers that they need not conduct any investigation unless there is an order made against the bankrupt by the court and/or any order for further examination of the affairs of the bankrupt at the conclusion of the PE;

(e) The DGI submits that s. 52 of the Act 360 is not applicable because:

(i) the bankrupt's action in dissipating his 50% shares in Kesuma property was made in good faith and valuable consideration;

(ii) nothing can void settlement in bankruptcy case if the transfer made before ROAO;

(iii) the person other than the bankrupt was unaware of any act of bankruptcy committed; and

(iv) Kesuma property is a property charged to the bank.

Section 52 of the Act 360 provides that:

> (1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or encumbrance in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency, unless the parties claiming under the settlement can prove that the settler was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settler in such property had passed to the trustee of such settlement on the execution thereof.

(f) Regarding the sale of the bankrupt's car and three club memberships, again the DGI submits that it was done before ROAO was recorded against the bankrupt;

(g) The DGI has instructed all banks having accounts under the name of the bankrupt to surrender any money of the bankrupt in the bankrupt's accounts;

(h) The DGI also had written to the respective secured creditors several times to find out the current status of the properties to which there was no response; and

(i) Furthermore, the Subang property and Kayangan Heights property are charged to the secured creditors and there is no order made by the court after the bankrupt's conducts, dealings and properties were examined at the PE.

Submissions By The Bankrupt

[10] The applications of the JC and the other creditors are misleading and wrong in law. The JC and the other creditors in fact are not sure under which provision of the law their applications lies as there is none. According to the JC and the other creditors, the said applications are filed pursuant to s. 86 and/or s. 87 and/or s. 91(1) of the Act 360 and/or the inherent powers of this court.

[11] Section 86 of the Act 360 provides as follows:

> If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Director General of Insolvency, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just

[12] Section 87(1) of the Act 360 provides as follows:

> (1) The court shall take cognisance of the conduct of the Director General of Insolvency, and in the event of the Director General of Insolvency not faithfully performing his duties and duly observing all the requirements imposed on him by any statute, rules or otherwise with respect to the performance of his duties, or in the event of any complaint being made to the court by any creditor in regard thereto, the court shall inquire into the matter and take such action thereon as is deemed expedient.

[13] Section 91(1) of the Act 360:

> Subject to this Act the court, under its jurisdiction in bankruptcy shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

[14] It is submitted by the bankrupt that the above provisions are not applicable to an application under s. 33(1) of the Act 360 where the court is considering the application of a bankrupt for an order of discharge by the court. In application for discharge, the proper procedure to follow is as follows:

> Section 33. Discharge by bankrupt by order of court.
>
> (1) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.
>
> ...

A (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any
B conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[15] Meanwhile, r. 196 of the Bankruptcy Rules 1969 provides as follows:

196. Reports of Official Assignee

C (1) In every case of an application by a bankrupt for his discharge the report of the Official Assignee made pursuant to s. 33 shall be filed not less than seven days before the time fixed for hearing of the application, and a copy thereof shall be sent to the bankrupt by registered post.

(2) Where a bankrupt intends to dispute any statement with regard to his
D conduct and affairs contained in the Official Assignee's report he shall not less than three days before the hearing of the application for discharge give notice in writing to the Official Assignee specifying the statements in the Report which he proposes to dispute at the hearing.

(3) If a creditor who has proved intends to oppose the discharge of a
E bankrupt he shall give notice of the intended opposition stating the grounds thereof to the Official Assignee not less than three days before the hearing of the application.

[16] The Act and the Rules made thereunder clearly provide for provisions that allow the bankrupt, but not the creditors to dispute the statements in the
F DGI's report. Furthermore, there is no requirement under the Act for the DGI to serve a copy of his report under s. 33(3) of the Act to the creditors.

[17] Meanwhile, the creditor, Westech Sdn Bhd has no locus to file encl. 122 as it has been wound up. It is trite law that the said creditor should now be represented by the liquidator, not solicitor for the creditor in
G liquidation. On this ground alone, encl. 122 should be dismissed.

Decision

[18] I have perused the cause papers and submissions made by the parties. With greatest of respect, I find myself to be inclined to agree with the
H contention of the bankrupt ie, that encls. 199 to 123 are misleading and without basis.

[19] It must always be borne in mind that the report of the DGI came into picture due to the requirement set out under s. 33(3) of the Act 360 ie,:

(1) A bankrupt may at any time after being adjudged bankrupt apply to
I the court for an order of discharge, and the court shall appoint a day for hearing the application.

(3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[20] The legislative intent of the legislators is clear; in deciding whether to grant or refuse an order of discharge, the court shall take into consideration a report of the DGI. However, the mandatory requirement that the DGI's report is the *prima facie* evidence of the conduct of a bankrupt is not without exception. The courts had, from time to time decided that if indeed that the court finds that the DGI's report is incomplete and unreliable, the court can reject the usage of the DGI's report in granting or refusing the order for discharge.

[21] I have perused the authorities submitted and I find that the authorities cited by the JC and the other creditors in which the courts held that the DGI's reports filed are incomplete, are all relating to DGI's report filed pursuant to s. 33(3) of the Act 360, for order of discharge. In this instance, hearing of encl. 105, ie, the order for discharge is still pending disposal of encls. 119 to 123. Hence there is no basis for these applications to be filed and heard now.

[22] In *Re Lau Kah Lay & Tang Kuong Tiew; Ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960, where it was held as such:

This is the second time that the bankrupts had applied for a discharge, the first having been dismissed by me on 21 February 1998 and in which judgment I directed the Official Assignee to make further investigation and to give a further report. That report has been given but the Official Assignee in the report stated that they are powerless to investigate the wives of the bankrupts. The law in this regard is s. 31 of the Act, *viz*.:

s. 31 Discovery of debtor's property

(1) The court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after a receiving order had been made against a debtor, summon before it the debtor, or any wife of his, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court deems capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made

A known to the court at the time of its sitting and allowed by it, the court may by warrant cause him to be apprehended and brought before it concerning the debtor, his dealings or property.

(3) The court may examine on oath, either by word of mouth or by the written interrogatories, any person so brought before it concerning the
B debtor, his dealings or property.

(4) If on the examination of any such person it appears to the court that he is indebted to the debtor, the court may, on the application of the Official Assignee, order him to pay to the Official Assignee, at such time and in such manner as to the court seems expedient, the amount in which he is indebted or any part thereof, either in full discharge of the whole
C amount in question or not as the court thinks fit, with or without costs of the examination.

(5) If on the examination of any such person it appears to the court that he has in his possession any property belonging to the debtor the court, on the application of the Official Assignee, order him to deliver to the
D Official Assignee such property or any part thereof at such time and in such manner and on such terms as to the court seems just.

(6) The powers given to the court under this section may in all cases be exercised by the Registrar and any order made or act done by the Registrar shall be deemed the order of act of the court.

E The Official Assignee also took the position that it is up to the creditors to do their investigation but the primary duty is upon the Official Assignee. The Official Assignee cannot take the same attitude of the creditors because that office serves a greater interest than the self-interest of the creditors.

F It is understandable why creditors cannot afford to take further steps that involve costs to them as they are already saddled with a debt they have yet to recover and therefore it is unreasonable to expect them to expend money to do the things which the Official Assignee is authorised to do under the Bankruptcy Act 1967. The Official Assignee carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away
G whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the Official Assignee does not show itself equal to the task of preventing such rip-off of the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will
H be the rule rather than the exception. Then the business morality will decline.

[23] It is clear from this case that the court is empowered to direct further investigation to be conducted by the DGI at the hearing of the order of
I discharge by Order of Court should the report provided is incomplete and devoid of pertinent information.

[24] In the abovementioned case, the learned judge directed the official assignee to make further investigation and provide additional report as to address the suspicious acts of the bankrupt's wife.

[25] I also refer to another case ie, *Development & Commercial Bank Bhd & Ors v. Loke Theen Fatt* [2010] 5 CLJ 583 where the learned judge held as follows:

> … the application for the Respondent's discharge must be dealt with pursuant sec 33(3) of the Act which states as follows:
>
> > (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.
>
> This section provides the court some guidelines as to how to exercise its discretion whether or not to grant an order of discharge. These guidelines require the court to look at the totality of the evidence or circumstance of the bankrupt and then ask itself the question whether it is fair or just to grant a discharge. The starting point must be the DGI's report which in law must be taken as *prima facie* evidence of the Respondent's conduct but it can be challenged by the creditors as stated by Ian Chin J in *Re Lau Kah Lay & Anor; Ex p Cold Storage (M) Bhd* [2001] 3 CLJ 960; [2001] 6 MLJ 311:
>
> > The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.
>
> The DGI had prepared two reports for the court and on the face of it they are comprehensive. It is my view that when the DGI in his report raises no objection to the application for discharge by the Respondent the court should grant the discharge unless the opposing creditor can show cogent reasons why the DGI's report should not be accepted. The role of the DGI is statutorily prescribed and it involves administrating the estate of the bankrupt including a thorough investigation of the debtor's affairs for the purpose of making a report for the court and to find out whether if there is any evidence of any offence under the Penal Code and the

A Bankruptcy Act. From the reports submitted in this case one can see that the DGI had performed his statutory duties as required by law. He had in his supplementary report made a quite a detailed write up on the activities of the Respondent and his wife in relation to the companies related to the Respondent. He had also found no impropriety in their conducts and there is no evidence by the opposing creditors to say that
B the DGI's findings are flawed. In fact his specific finding is that there is no proof that the Respondent 'had been guilty of any fraud or breach of trust'. It is not insignificant that the Appellants had not provided any information or evidence to the DGI to further investigate what they are alleging. The DGI had performed his statutory duty and if the Appellants are not satisfied with it they have a duty to challenge his report with
C evidence. In the present case there was no such evidence.

[26] In this instant case, I am of the view that if the JC and the other creditors have abundance of strong reasons as to why the DGI's report shall be rejected, they may object to the DGI's report at the hearing of order of
D discharge by Order of Court before the Registrar.

[27] In the case of *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors and Other Appeals* [2010] 8 CLJ 680, Ramly Ali JCA (as he then was) held as follows:

[30] The court is aware that on the hearing of an application for an order
E of discharge, the court shall take into consideration a report by the DGI. This is a mandatory requirement. However, it does not mean that the court is bound to accept the statements therein contained. No doubt sub-s. (8) of s. 33 provides that for the purpose of an application for a discharge the DGI's report shall be *prima facie* evidence of the statements contained therein; but the court is duty bound to scrutinise the truth and reliability
F of the statements and in appropriate case, when the court is satisfied that the report is incomplete and misleading, the court is not bound to accept the statements contained in the report. This is particularly so, as in the present case, where the amount of debts involved are huge (about RM25 million); bearing in mind the bankruptcy was initiated by the bankrupt himself (not by any of the creditors); the application for an order of
G discharge was only filed two years ten months after the AORO was granted; and the dividend declared is only 1% of the total debts. The status of "*prima facie*" evidence as provided under sub-s. (8) is rebuttable, and not conclusive.

Conclusion

H

[28] The applicants to those applications have failed to show under what provision of the law those applications were made. It is premature for them to challenge the DGI's report now as the proper platform to challenge or dismiss the DGI's report is at the hearing of the order for discharge pursuant
I to s. 33 of the Act 360.

[29] However unreliable, inaccurate or incomplete the DGI's report is, the applicants cannot simply ask the court to set it aside now. The report is a mandatory requirement for an application for discharge. However it is still up to the court whether to accept the statement contained therein or to ask for further investigation.

[30] On those reasons, encls. 119, 120, 121, 122 and 123 are dismissed with cost.